

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 vs. : CR. No. 00-167-02
 :
 HARVEY JEFFERSON :

MEMORANDUM

ROBERT F. KELLY, Sr. J.

DECEMBER 11, 2002

Harvey Jefferson, hereinafter ("Jefferson or petitioner") filed a timely motion under 28 U.S.C. 2255 contending that his counsel, at his sentencing, was ineffective for not filing a direct appeal. A hearing was set on this motion and the Federal Defenders Association was appointed to represent Jefferson.

At the hearing counsel advised the court that Jefferson wished to withdraw the grounds alleged in the original petition for the reason that he was now convinced that they were without merit. N.T. 11/15/02 p. 3-7. After determining that Mr. Jefferson understood and agreed with this the court treated the original grounds set forth in the petition as withdrawn.

At that point counsel for Jefferson requested leave to amend the petition in order to set forth the claim that he should be allowed to withdraw his guilty plea because he did not understand at the time he signed the guilty plea agreement the impact of some of the things that he had agreed to. N.T. 11/15/02 p. 4. The court allowed the amendment and Mr. Jefferson testified at the hearing as follows:

DIRECT EXAMINATION

BY MR. WILSON:

“Q. Mr. Jefferson, do you recall signing the plea agreement in this matter?

A. Yes, I do now.

Q. Okay. Do you recall that when you signed it, whether you had a discussion with your attorney at the time, Mr. Kaminkow, about the plea agreement?

A. Yeah, we had a discussion. It was pretty brief, and I didn't really understand.

Q. Okay. Had you indicated to Mr. Kaminkow that you wanted to plead guilty to the charges?

A. Yes, I did want to plead guilty.

Q. Okay. Had you had a discussion with Mr. Kaminkow about the potential sentence that you might face?

A. I was under the impression that my sentence wouldn't go no further than 120 months.

Q. Did you have a discussion about the provisions within the plea agreement?

A. The provision as of me being a leader organizer.

Q. Do - - you recall having - -

A. I

Q. - - a discussion about that?

A. I - -

Q. Did you - - that one you did agree to?

A. I did not agree to.

Q. Okay. Do you recall - - do - - do you realize though that it's now in the plea agreement that - - that says that you did agree to it?

A. Yes, I do.

Q. Okay. You recall having a discussion with Mr. Kaminkow specifically about that provision, and saying that you didn't agree to - - with it?

A. Yes, sir.

Q. Do you recall having any discussion about what the sentencing guidelines were going to be based on the stipulations in the plea agreement?

A. No, I don't remember.

Q. Okay. At what point did you find out that the guide - - the sentencing guidelines were going to be 168 to 210 months?

A. Pretty much when I got sentenced. That day of sentencing.

Q. Did you have any discussion about whether the - - what the Judge's capability would be of going outside of the guidelines? In other words, sentencing lower than the guidelines, or sentencing higher than the guidelines?

A. No, actually I didn't until the end - - until sentencing. He told me that he couldn't go - - he could only go to 168 months.

MR. WILSON: Okay. I have no further questions.

BY MR. WILSON:

Q. Well at the time that you signed the plea agreement, did you understand that the sentencing guidelines would be 168 to 210 months?

A. No, sir."

In short, Mr. Jefferson's testimony indicated that he did not think his sentence would go beyond 120 months; he did not agree to being a leader or organizer; he did not

discover that the sentencing guideline range was 168 to 210 months until the day of sentencing. On cross-examination Jefferson admitted that he was aware that the sentencing guidelines applied to his case and that there was a mandatory minimum requirement of 120 days in custody. N.T. 11-15-02 p. 13. Jefferson admitted on cross-examination that his attorney showed him the guilty plea agreement and that he understood everything except the stipulations that he had a leadership role and the amount of the drugs. N.T. 11-15-02 pgs. 14 and 15. Jefferson also admitted that he signed the guilty plea agreement N.T. 11-15-02 p. 19.

STANDARD TO BE APPLIED

After imposition of sentence a motion to withdraw a guilty plea will be granted only to correct manifest injustice. Federal Practice and Procedure, Criminal 2d §539. When there is denial of due process, there is “manifest injustice” as a matter of law. U.S. v. Carusso, 536 F.2d 21 (3rd Cir. 1976).

For the following reasons I find that petitioner has failed to meet this burden:

Michael Kaminkow, Jefferson’s guilty plea counsel, testified that he attended proffer sessions with Jefferson and the United States Attorney and had several discussions where he “clearly explained . . . that he was looking at, number 1, a minimum mandatory, but that his sentence could exceed the minimum mandatory. N.T. 11-15-02 p. 22. Kaminkow also testified that he went over the guilty plea agreement with Jefferson. N.T. 11-15-02 p. 24. On cross-examination Mr. Kaminkow was asked if he indicated to Mr. Jefferson what guideline range he would have to expect would be applied. In explaining the procedure that he followed Mr. Kaminkow stated the following:

“And I told him in my judgment, the evidence against him was overwhelming,

and he should consider cooperating, which he did very early on. I believe these proffer sessions occurred relatively shortly after his arrest. And I think that the whole problem that he's having today is that he anticipated that the Government would file such a motion. The Government did not file such a motion."

GUILTY PLEA AGREEMENT

Paragraphs 9a and 9d of the guilty plea agreement clearly set forth the stipulations that petitioner now contends he did not understand.

"a. The parties agree and stipulate that: at least 5 kilograms of cocaine was imported in furtherance of the criminal activity jointly undertaken by defendant and co-conspirators; this amount was within the scope of the defendant's agreement; this amount was reasonably foreseeable to the defendant in connection with the conspiracy; and the defendant's base offense level is 32 based on this amount pursuant to Guideline sections 1B1.3 and 2D1.1(5).

d. The parties agree and stipulate that pursuant to Guideline Section 3B1.1(c), there is a four level upward adjustment for the defendant being an organizer or leader."

In addition the guilty plea agreement at paragraph 7 clearly sets forth the maximum possible sentence under the statute involved.

"7. The defendant understands, agrees and has had explained to him by counsel that the Court may impose the following statutory maximum and mandatory minimum sentences: Count 1, conspiracy to import cocaine, life imprisonment, a mandatory minimum sentence of ten years imprisonment, at least a five-year term of supervised release (possible lifetime of supervised release), a \$4,000,000 fine and a \$100 special assessment."

GUILTY PLEA COLLOQUY

In the guilty plea colloquy the defendant was advised that as to the maximum possible sentence under the statute involved and he indicated to the court that he understood. N.T. 8-14-00 p. 8.

Also at the guilty plea hearing the court asked the Assistant United States Attorney to outline the terms of the Plea Agreement and the following took place.

MS. RICE: Yes, your Honor.

The plea agreement includes - - well, it provides that the defendant will plea guilty to Count 1, conspiracy to import cocaine in violation of Title 21 United States Code, Section 963. It also includes language regarding the defendant's cooperation with the Government and the potential for the Government to file a 5K1 motion on behalf of the defendant, prior to sentencing. A final decision as to the filing of a 5K1.1 motion has not been made at this time.

In the plea agreement, the parties stipulate to the following:

The relevant conduct of the defendant's offense includes the importation of, at lease, five kilograms of cocaine in furtherance of criminal activity jointly undertaken by the defendant and this amount was within the scope of the defendant's agreement, this amount was reasonably foreseeable to the defendant and the defendant's guideline range should be based on this amount, pursuant to Section 1B1.3.

The parties also stipulate that as of the date of the plea agreement, the defendant is eligible for a three-point reduction to his base offense level, based upon his timely acceptance

of responsibility, pursuant to Section 3E1.1 and the parties further stipulate and agree that pursuant to Guideline Section 3B1.1C, there is a four-level upward adjustment for the defendant being an organizer or a leader.

Those are the essential terms of the plea agreement, your Honor.

THE COURT: Mr. Kaminkow, is that your understanding of the - -

Mr. KAMINKOW: Yes, your Honor, it is.

THE COURT: And Mr. Jefferson, is that your understanding?

THE DEFENDANT: Yes, sir, your Honor.

THE COURT: And do you think that any other promises have been made to you?

THE DEFENDANT: As in - -

THE COURT: Do you feel that, other than what's been mentioned here, have any other promises been made to?

THE DEFENDANT: No, sir, your Honor.

THE COURT: Okay. It's important, because if they aren't mentioned here or if they're not set forth in this written agreement, you wouldn't be able to enforce them later; do you understand that?

THE DEFENDANT: Yes, sir, your Honor.

THE COURT: Okay. Do you have any questions of me, as to what you're doing or what this procedure is?

THE DEFENDANT: No, no questions, your Honor."

N.T. 8-14-00 pgs. 8-10.

FACTUAL BASIS FOR PLEA

Also at the guilty plea colloquy the Assistant United States Attorney was asked to establish a factual basis to support the plea of guilty at which time she recited the following:

“If the case were to proceed to trial, the Government would prove beyond a reasonable doubt, the elements of the crime charged through, among other things, the testimony from cooperating co-defendants and airline and hotel records.

And that evidence would show that in or around February of 1999, this defendant's co-defendant, Eddie McClain flew to Jamaica with two female individuals for the purpose of picking up cocaine. While in Jamaica, the cocaine, which weighed approximately five kilograms was taped to the two female individuals' bodies and the co-defendant, Mr. McClain and the two females came back through the Baltimore/Washington International Airport without detection.

In June of 1999, the co-defendant McClain contacted one of the females and another female, asking them to perform the same task for payment to go to Jamaica, West Indies to pick up cocaine. And the night before they flew, they went to - - they were driven by the co-defendant McClain to the Red Roof Inn, which is near the Philadelphia International Airport and they stayed in a room that had been reserved for and paid for by the defendant, Mr. Jefferson.

Mr. Jefferson had left that day, himself, on a flight for Jamaica, West Indies. The following day, the two women flew to Jamaica and were met at the airport by this defendant and brought to a place, where they stayed for approximately one week.

Upon the end of their trip, they - - an individual came and taped approximately

five kilograms of cocaine to both female individuals. They flew back into the United States through the Philadelphia International Airport and were apprehended there after the cocaine was found taped to their bodies.

And that cocaine was tested and found positive to be cocaine and weighing approximately five kilograms.

THE COURT: Okay. Mr. Jefferson, do you understand that by entering a plea of guilty, you're admitting those facts that were just recited by the Assistant United States Attorney?

THE DEFENDANT: Yes, sir, your Honor."

DISCUSSION

Jefferson's testimony seems to be that he understood everything in the guilty plea agreement except that he was agreeing that he had a leadership role and that the amount of drugs involved exceeded 5 kilograms. Jefferson has failed to carry his burden in this case first because his counsel testified that he went over the guilty plea agreement with Jefferson and explained that there was a minimum mandatory aspect to his guilty plea but that his sentence could exceed that. I credit the testimony of Mr. Kaminkow.

Second, the guilty plea agreement at paragraphs 9a and d clearly set forth that the amount of drugs involved was at least 5 kilograms and that that would result in a base offense level of 32 under the Sentencing Guidelines and that his designation as an organizer or leader would result in a four level upward adjustment in his total offense level. Mr. Jefferson admitted signing the guilty plea agreement.

Third, at the guilty plea colloquy, in addition to his being advised as to the

maximum possible sentence under the statute involved, Ms. Rice the Assistant United States Attorney, with the defendant no more than ten feet away, specifically read the substance of paragraphs 9a and d in open court. The defendant indicated to the court that he understood what the Assistant United States Attorney had read. Mr. Jefferson was asked by the court if he had any questions of the court as to what he was doing in entering the plea and Mr. Jefferson indicated that he had no questions.

Fourth, during the plea of guilty hearing the Assistant United States Attorney in supplying a factual basis for the plea made specific reference to the fact that the cocaine involved weighed approximately 5 kilograms and the other facts set forth clearly support the stipulation that Mr. Jefferson was an organizer or leader in this crime.

For these reasons I find that Jefferson has failed to establish his contention that he did not understand that he was stipulating to the weight of the drugs being 5 kilograms and to his leadership role in this offense. He therefore has failed to meet his burden of proving that manifest injustice would result if he was not allowed to withdraw his guilty plea.

I therefore enter the following Order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
vs.	:	CR. No. 00-167-02
	:	
HARVEY JEFFERSON	:	

ORDER

AND NOW, this 11th day of December, 2002, it is hereby

ORDERED that the petition for a Writ of Habeas Corpus is **DENIED WITH PREJUDICE**. There is no probable cause to issue a Certificate of Appealability.

BY THE COURT:

ROBERT F. KELLY, Sr. J.